DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220174 DATE: November 12, 1985

MATTER OF: Consolidated Maintenance Company

DIGEST:

1. Protest allegations are academic and not for consideration by GAO where agency modifies the challenged solicitation provisions as the protester requests.

2. In the absence of evidence clearly establishing a substantial adverse impact on competition, GAO will not object to an agency's use of minimum manning or equipment requirements to ensure adequate service.

3. Protest that requirement for full time (versus part-time) workers is unduly restrictive is denied where the agency has supported the requirement and the protester has failed to show that the requirement is improper or clearly unreasonable.

4. Salient characteristics listed in brand name or equal description are presumed to have been regarded as material and essential to the agency's needs.

Consolidated Maintenance Company (Consolidated) protests certain provisions in invitation for bids (IFB) FPL-85-12 issued by the Department of Agriculture, Forest Products Laboratory, Madison, Wisconsin (Agriculture), for the procurement of janitorial services.

Consolidated initially objected to seven different clauses contained in the IFB. Agriculture amended the IFB in response to Consolidated's protest. Consolidated still objects to six of the amended clauses. We deny Consolidated's protest.

Consolidated protests against the clause in the IFB which deals with liquidated damages. Consolidated argues that the sum of $250 per day for failure to perform is an unenforceable penalty because it could be applied if

a small cleaning task was not performed (for example, if the contractor failed to clean a single drinking fountain).

Agriculture states in its report on this matter that, in order to clarify its intention to not charge $250 per day for a contractor's failure to perform individual cleaning tasks, it amended the IFB. The amended clause states in a note that the clause shall apply only where there is either a total failure of the contractor to perform the specified contract work, or the contractor's performance is of such low quality or quantity that the contract is about to be or has been terminated for default. This amended clause, therefore, makes it clear that the selected contractor will not be penalized $250 per day for minor individual omissions such as the failure to clean a single drinking fountain.

Consolidated, in its comments on the agency report, expresses concern that, since in the past liquidated damages have been applied when the contractor was in partial default due to its failure to perform specific tasks, this may again happen under this liquidated damages clause. As stated above, however, the clause is worded so that it applies only when there is a total failure to perform or if the contract is about to be or has been terminated for default. The liquidated damages clause does not apply to "partial default" situations.

Consolidated complains about the listing in the IFB of companies that have in the past performed the different types of work included in the IFB. Although the IFB states that the companies are listed for information purposes only and that bidders should not construe the list as a requirement to utilize the services of the listed companies, Consolidated argues that the listing of these companies is unfair to other companies which could perform the work but are not listed.

Agriculture states that this list was incorporated in the IFB because on prior occasions numerous contractors, including Consolidated, inquired as to which companies in the Madison, Wisconsin, area performed the required services. Agriculture adds that potential bidders previously indicated that the information in question would be helpful in the preparation of bids. In view of the fact that the solicitation makes it clear that the listing is provided for information purposes only, we see no harm or impropriety resulting from the list.

Consolidated objects to the IFB provision which suggests the minimum manning level which Agriculture believes is necessary to perform the required work. Consolidated argues that, although the specification states that the manning levels are only "suggested," since they are listed under the heading "general requirements," they could be considered as required. Consolidated states that required manning levels "could have an adverse effect on pricing and competition."

Agriculture states that the suggested manning levels appear in the IFB merely to inform bidders as to how many people Agriculture thought it would take to do the job, and not as a minimum requirement. Since the clause in question uses the term "suggested" three times and states that "personnel requirements may vary due to experience, absenteeism, turnover, etc.," it is clear that it is intended strictly to give bidders guidance and not to serve as a requirement. Moreover, we note that, as here, in the absence of evidence clearly establishing a substantial adverse impact on competition, we would not question even a required minimum manning level which an agency believes is necessary to ensure adequate service. See Linda Vista Industries, Inc., B-214447, B-214447.2, Oct. 2, 1984, 84-2 C.P.D. ¶ 380.

Consolidated protested the minimum equipment requirement in the IFB. However, as a result of Consolidated's protest, Agriculture amended the clause from minimum equipment required to suggested minimum equipment. Agriculture's amendment of this section of the IFB renders Consolidated's protest against required equipment academic, and not for our consideration. See Halifax Engineering, Inc., B-219178, July 22, 1985, 85-2 C.P.D. ¶ 68. In any case, as stated above, in the absence of evidence establishing a substantial adverse impact on competition, we would not question even a minimum equipment requirement. Linda Vista Industries, Inc., B-214447, B-214447.2, supra.

Consolidated objects to the clause which requires the selected contractor to perform work in buildings from 3:30 p.m. to 12 a.m., Monday through Friday, and which states that the entire custodial staff allotted to the contract shall be present during this entire time except for illness, injury or other personal reasons approved by the project manager. Consolidated argues that the workload under custodial contracts is not constant and the ability to include workers of less than a full 8-hour shift is essential.

Consolidated contends that, without such flexibility, the cost to the government would be increased by having, at times, unproductive contractor employees.

Agriculture states that the clause was included in the IFB because of its experience on a prior contract which permitted part-time workers. Agriculture argues that the result of allowing part-time workers was that a wide range of employees were present on a given evening (10-30), nobody, including the project manager, knew what anybody else was doing, and work was performed in a rushed and sloppy manner because workers knew they could leave early. Agriculture states, however, that it recognizes that occasionally part-time workers may be necessary to accommodate fluctuations in workload and that therefore it amended the IFB to permit occasional part-time workers.

The determination of the needs of the government and the best method of accommodating those needs are primarily the responsibility of the contracting agency. We will not question the contracting agency's determination absent a clear showing that it is unreasonable. Logistical Support, Inc., B-212218, B-212219, Feb. 23, 1984, 84-1 C.P.D ¶ 231. Once an agency establishes support for its contention that the restrictions it imposes are needed to meet its minimum needs, the burden shifts to the protester to show that the requirements complained of are clearly unreasonable. Polymembrane Systems, Inc., B-213060, Mar. 27, 1984, 84-1 C.P.D. ¶ 354.

Agriculture has established support for its requirement that most workers be present for the full shift. Consolidated's response merely argues that it is not the government's responsibility "to shepherd the contractor," and that the government's intent is to administer this contract as though it was a personal services contract. Consolidated has failed, however, to show that the requirement is unreasonable or improper. See Renaissance Exchange, Inc., B-216049, Nov. 14, 1984, 84-2 C.P.D. ¶ 534.

Consolidated protested the failure of the IFB to list the required salient characteristics of brand name or equal cleaning products which the IFB states must be used by the contractor in performing the janitorial services. In response, Agriculture listed as the salient characteristics of the cleaning products ingredients of the brand name products. Additionally, Agriculture required bidders

proposing to use equal products to list the products and product specifications in their bids. The IFB contained the brand name or equal clause requiring equal products to meet the salient characteristics listed in the IFB.

Consolidated argues that a list of a product's ingredients is not necessarily the same as the product's salient characteristics. However, in this case, Agriculture has made the brand name ingredients the salient characteristics by listing them as salient characteristics. Listed salient characteristics are presumed to have been regarded as material and essential to the agency's needs. The Prime-Mover Co., B-201970, Oct. 21, 1981, 81-2 C.P.D. ¶ 325. Consolidated has not stated why it considers any ingredient to be excessive to the agency's needs. Thus, Consolidated has presented nothing to rebut the presumption of materiality and essentiality. Therefore, we find no basis to question the salient characteristics.

for Seymour Efros
Harry R. Van Cleve
General Counsel